United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellees,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA, AFL-CIO, et al.,

Intervenors-Appellants,

-and-

COMMUNITY SCHOOL BOARD, DISTRICT 26,

Intervenors-Appellants.

AND

UNITED STATES OF AMERICA,

Petitioner-Appellee,

-against-

SOLOMON DEREWETZKY, et al.,

Respondents-Appellants.

76-6096

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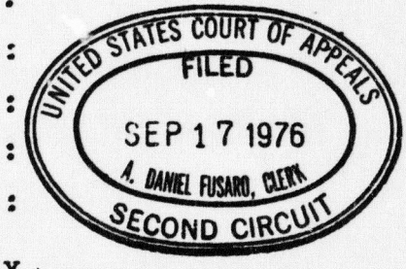

Appeal From An Order Of The United States District Court For The Eastern District of New York

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SUPPLEMENTARY BRIEF FOR INTERVENORS-APPELLANTS CSA AND DEFENDANT-APPELLANT HOWARD W. HOROWITZ

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SUPPLEMENTARY BRIEF FOR INTERVENORS-APPELLANTS COUNCIL OF SUPERVISORS AND ADMINISTRATORS AND RESPONDENT-APPELLANT HOWARD W. HOROWITZ

This brief is submitted pursuant to the order of the panel hearing oral argument (Van Graafeiland, C.J., Kelleher, D.J. and Gagliardi, D.J.) issued August 19, 1976, and is directed to the following questions: Whether the District Court injunction should be modified because it fails to recognize and protect the Fifth Amendment privilege against

self-incrimination of individual CSA members? Whether the contempt adjudication against Howard W. Horowitz must be vacated?

ARGUMENT

POINT I

THE REPORT OF THE MAGISTRATE BELOW RECOMMENDING MODIFICATION OF THE INJUNCTION TO PROTECT FIFTH AMENDMENT RIGHTS OF THE CSA MEMBERSHIP WAS CORRECT AND SHOULD HAVE BEEN ADOPTED BY THE DISTRICT COURT.

On July 2, 1976, Magistrate Chrein filed a report, pursuant to direction by the District Court below, with regard to a motion by the CSA on behalf of its officers to vacate or modify the District Court's order of May 27, 1976, which enjoined, inter alia, the CSA membership* from refusing or failing to complete and answer certain forms and special compliance reports prepared by the Office of Civil Rights.

The Magistrate concluded that the injunction, issued before CSA intervened on behalf of its membership, should be modified in order to protect "any individual's right to refuse on grounds of a personal privilege against self-incrimination, to gather and provide information not presently maintained in school or board records". (A.377)** (Emphasis in the original.)

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* The order enjoined not only the Board of Education, its members and their agents, but also ". . . employees, subordinates, and all persons or entities in active concert or participation with them or subject to their supervision in this matter. . ." from refusing to answer and complete the specified forms. (A.215)

** All references, unless otherwise specified, are to the Joint Appendix.

The Magistrate reasoned that while the Fifth Amendment provides no defense, either to an artificial entity or to the custodian of its records, against a demand for production of such records,

> "Compliance with the Court's injunction order does, however, require principals, supervisors, teachers, and others to make observations and report these observations. Since these observations may form the substance of a more than hypothetically possible prosecution for the crimes of conspiracy to violate civil rights or violation of civil rights, principals, supervisors and others should be permitted individually to assert a claim of privilege against the requirement to observe and report." (A.385) (Emphasis added.)

We submit that the Magistrate's report was correct in this respect and that the District Court injunction must be modified in accordance with his recommendation.

The findings of the Magistrate, sitting as Special Master, and the pleadings and testimony below establish that the information sought by the Government in Form EEO-5 and the Special Compliance Report was for the express purpose of substantiating complaints of illegal activity and determining where and how long the violations of law had occurred -- and not, as the Government argues, as a general compliance survey of school systems generally. This information, as the Magistrate found, may tend to establish criminal liability of individuals, as well as civil and criminal liability of artificial entities. Moreover, the information sought is not confined to reproducing data contained in official records, but requires individuals to report on their own observations and

conclusions. Where potentially incriminating information not contained in business records is sought from individuals employed by a collective entity, they have a personal Fifth Amendment privilege not to respond to the questions. In such a case, the Government must obtain the requested information by other means which do not infringe upon the individual's constitutional rights.

The pleadings and the testimony taken in connection with the action for injunctive relief fully support the Magistrate's conclusion in his first report of May 27, 1976, that:

> "The Special Compliance Reports which are the subject of the present controversy, constitute the final phase of this investigation and were designed to obtain detailed information relevant to ascertaining whether certain violations of law existed." (A.205)

The complaint alleges that the reports are necessary to the investigation of complaints "alleging various and widespread instances of illegal discrimination in the public schools" (A.8); and that failure to complete the reports "is preventing the Government from acquiring information necessary and relevant to the alleged violations under investigation . . ." (A.8-9) The affidavit in support of the complaint reiterates that "as a result of various complaints of specific and widespread violations of the statutes outlined in paragraph 1, a Special Compliance Report was developed to obtain specific information concerning these possible violations of law". (A.13)*

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* See also letter of May 3, 1976, reproduced at A.65-A.66.

The testimony before the Magistrate, sitting as Special Master, also confirms that the reports "were geared to investigating the possible existence of special types of violations". (A.105; see also A.123-125); and that they were designed to elicit data showing "whether or not potential violations have occurred, where and how long they've occurred, and how widespread they are". (A.173; also A.171-178*)

The Magistrate specifically found that the reports sought "information pertinent to an investigation of possible violations of law within a particular school system" and were not "part of a survey of school systems in general . . ." (A.205)

The fact that the Form EEO-5 and the Special Compliance Report were designed as investigative tools to substantiate complaints of illegal conduct and to pinpoint their occurrance (A.173) distinguishes this case from California v. Byers, 402 U.S. 424 (1971), as the Magistrate below points out. (A.386) In Byers, the statutory reporting requirement was not designed to identify particular violations of law, but merely to identify persons involved in automobile accidents. As the Court noted, ". . . it is not a criminal offense under California law to be a driver 'involved in an accident'". 402 U.S. at 431.

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* "Q: . . . In other words, the information you are seeking, is that designed specifically to . . . substantiate the widespread existence of a type of complaint that you've heard?

"A: Yes." (A.178)

In this case, as the Magistrate below found,

> "The HEW and ORC are involved in an extended investigation of possible discrimination in the Public School system of New York City and now seek specific facts which will aid them in determining if any School Board, its members and/or employees have engaged in acts of discrimination or violations of the civil rights of various complainants. (Emphasis added.)
>
> * * *
>
> ". . . The study being undertaken is addressed to these complaints, the persons burdened with reporting are potential targets of these complaints, and they should, therefore, be permitted, if they with, to object to being required to report on their own observations." (A.383, 386) (Emphasis added.)

New York has specific statutes -- described by one court as "highly penal in nature" (Pryce v. Swedish-American Lines, 30 F. Supp. 371, 372 (S.D.N.Y., 1939) -- making conduct like that under investigation by the Government criminal, and punishing it by imprisonment and fines. (See A.383-384; also N.Y. Civ. Rt. Law, Section 44(a).) Additionally, 18 U.S.C., Sections 241 and 242 also provide severe criminal sanctions for deprivations of civil rights. And in United States v. Johnson, 390 U.S. 563 (1968), the Supreme Court held that those statutes apply to violations of rights secured by the Civil Rights Act of 1964.

Thus, far from merely undertaking a general compliance survey of all or randomly selected school districts and requiring records of a general nature to be prepared by them, the Government has demanded answers to what amount to special interrogatories designed to elicit information necessary to establish violations of law carrying criminal penalties

in both the state and federal sphere, and also to identify "where and how long [these violations] have occurred". (A.173)

Moreover, the information required by the Government cannot be obtained merely by requiring the custodians of official records to report on material contained in records now maintained by the school system. The Magistrate specifically inquired whether this was possible and was informed that New York City regulations do not permit indication of "any child's ethnicity" and that the City "does not collect ethnic information by pupil". (A.150-151) As the Magistrate found, "Compliance with the Court's injunction order does . . . require principals, supervisors and others to make observations and report these observations". (A.385)

Thus, there is no question of an officer or agent refusing to produce business records of a collective entity in his possession, as there was in Bellis v. United States, 417 U.S. 85, 88-89 (1974). Here the question is whether individuals employed by a collective entity, having no Fifth Amendment privilege, have a personal privilege to refuse to supply information to the Government to substantiate complaints of illegal activity, which, if established, could subject them -- as individuals -- to criminal penalties. The Supreme Court has recognized this distinction, and has held that the individual's personal Fifth Amendment privilege protects him against being compelled to disclose this type of information.

In United States v. Kordel, 397 U.S. 1 (1970), the officers of a corporation were served with written interrogatories in a civil condemnation proceeding against the corporation, and responded to them after the District Court refused to stay the proceeding pending disposition of any criminal charges which might result from the same transaction. Criminal proceedings were instituted and the Court assumed "that the information [the officer] supplied the Government in his answers to the interrogatories, if not necessary to the proof of the Government's case in the criminal prosecution . . . at least provided evidence or leads useful to the Government". 397 U.S. at 6. The Court held that the officer's answers to the interrogatories were not subject to suppression as involuntarily given:

> "For [the corporate officer] need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination. Surely [the officer] was not barred from asserting his privilege simply because the corporation had no privilege of its own, or because the proceeding in which the Government sought information was civil rather than criminal in character." 397 U.S. at 7-8.

In Kordel, supra, the Court relied upon its decision in Curcio v. United States, 354 U.S. 118 (1957), which held that a union officer who fails to produce subpoenaed union books, as to which he has no personal privilege, is nonetheless privileged to refuse to explain or account for their non-production. In Curcio, the Court held that there was "no hint" its prior decisions in Wilson v. United States,

221 U.S. 361 (1911), United States v. White, 322 U.S. 694 (1944), and Shapiro v. United States, 335 U.S. 1 (1949), relied on by the Government in its brief (pp. 21-23), "that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office". 354 U.S. at 124.

In Priebe v. World Ventures, 407 F.Supp. 1244 (C.D. Calif. 1976), plaintiffs in a private civil suit sought oral depositions and written interrogatories from officers of the defendant corporation. The complaint involved violations of federal and state securities laws and could support an action for criminal liability. While recognizing that the corporation had no Fifth Amendment privilege, the Court permitted the officers, as individuals, to invoke their personal privilege and refuse to answer any of the questions, since:

> "Here, any question that could lead to discoverable evidence admissible in the civil proceeding could also provide 'a link in the chain of evidence' needed in a criminal prosecution." 407 F.Supp. at 1246.

These cases fully support the Magistrate's conclusion that:

> "Principals, supervisors and others should be permitted individually to assert a claim of privilege against the requirement to observe and report." (A.385) (Emphasis added.);

as well as his recommendation that the District Court rule that the information sought by the Government in connection

with EEO-5 Forms and Special Compliance Reports can be compelled only if it is:

> "Subject to any individual's right to refuse on the grounds of a personal privilege against self-incrimination, to gather and provide information not presently maintained in school or board records." (Emphasis in the original.)

Whatever obligation the School Board as an artificial legal entity has to supply the information required in the forms and special reports can be satisfied either by directing it to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation" (United States v. Kordel, 397 U.S. at 8); or by directing it to permit federal agents to make the observations and reports. The Government conceded at the initial hearing before the Magistrate that it had personnel available for this purpose and that there was really no good reason why federal personnel couldn't come into the schools to make the necessary survey. (A.148) Given the strongly held and morally* justified personal convictions of the school supervisory personnel against engaging in racial and ethnic classifications of themselves, their colleagues and their pupils, the Government could have obviated a greater part of this litigation by obtaining such information through its own staff, rather than by seeking

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* We have argued in our main brief that there is legal justification for this position as well, and make no further argument as to that point here only because the Court did not request it.

the arrest and incarceration of educators like Alan Starsky who stated to the Court below:

> "The necessity of the requirement that I categorize my colleagues and the children as belonging to a particular racial or ethnic group is repugnant to everything I stand for as a human being, as an educator, because we try to teach the children in the school the oneness of mankind." (A.268)

The protection given by the Fifth Amendment is that information necessary to incriminate an individual cannot be wrested from him, however necessary it may be to enforcement of the law. The Government is, of course, free to obtain this same information from other sources. The Government has alternative ways of collecting the information demanded here which neither encroach upon the Fifth Amendment privilege of the CSA membership nor require them to compromise their strongly held beliefs against racial and ethnic classification of individuals. The Government should be required to utilize such alternative methods in this case if the Court holds, contrary to the argument in Point II of our main brief, that coercion of racial and ethnic identification is not abhorrent to fundamental rights and basic liberty enjoyed by citizens of the United States.

POINT II

THE CONTEMPT ADJUDICATION OF THE DEFENDANT-APPELLANT HOWARD W. HOROWITZ MUST BE VACATED.

The contempt adjudication against Dr. Horowitz must be vacated because he was not a party or in privity with the parties to the action resulting in issuance of the District Court's injunction on May 27, 1976, and hence was not bound by that order.

After the injunction -- the predicate of the contempt proceedings against approximately 140 principals and supervisors -- issued, the CSA moved to intervene in the action on the ground that:

> "The Corporation Counsel, whose office appeared on behalf of the defendants, did not . . . appear for or represent any person other than the Board of Education, its members and the Chancellor. Even if the Corporation Counsel did purport to represent CSA's membership, it did not adequately represent the interests of supervisory employees." (A.224)

If intervenor status was granted, then:

> ". . . your deponent moves for relief from the judgment and order of the Court in Docket 76 Civ. 861 upon the ground that the judgment is void for lack of jurisdiction over the supervisory employees of the Board of Education embraced by this injunction." (A.224)

After argument on the motion, the District Court granted the motion to intervene "by the Council of Supervisors, by their officers . . . as officers and individually." (A.236, A.238), ruling:

> ". . . this is an intervention as of right because the applicants' claim and the interest relating to the action and the disposition of the action may as a practical matter appear to impair their ability to protect their interest.
>
> "I further find that their interests are not adequately represented by the existing parties in view of the possibility of a conflict of interest so that if there were no intervention as of right I would permit a permissive intervention since the intervenors claim a defense in the main action that there are questions of law and fact in common." (A.239)

The Court refused to suspend the injunction issued on May 27th, pending determination of the CSA claims, which it had referred to the Magistrate, as Special Master. (A.239-241)

The grant of the motion to intervene and the referral to the Special Master occurred on June 16, 1976. On June 22, 1976, before the Special Master had completed his report, contempt proceedings were instituted against approximately 140 principals and supervisors, including Dr. Horowitz, for failing to comply with the May 27th injunction, which their attorney was in the process of challenging before the Special Master, in accordance with the District Court's direction.

Counsel for the supervisors moved in this Court for a stay of enforcement of the order pending the decision of the Magistrate. A temporary stay was denied, and the case scheduled for oral argument in July. Counsel then requested the District Court "to adjourn the contempt hearing of Dr.

Horowitz until and when a determination is reached either by the Magistrate or the Court of Appeals". (A.328-331) This relief was also denied, and the contempt hearing and adjudication took place before the Special Master filed his report recommending modification of the June 27th injunction to protect the personal Fifth Amendment rights of individual employees like Dr. Horowitz.

Until the report of the Special Master issued and was acted upon by the District Court, the rights of the CSA membership, as individuals, "[had] not been adjudged according to law". Heyman v. Kline, 444 F.2d 65, 67 (2d Cir. 1971). The District Court recognized this when it granted the motion to intervene, yet ignored the same principle of law in proceeding with the contempt hearings before such an adjudication could be made.

In this case, as in International Brotherhood of Teamsters v. Keystone Freight Lines, 123 F.2d 326, 330 (10th Cir. 1941):

> ". . . none of the elements necessary to bind one not a party to the action were present. Intervenor cannot be bound on the theory of representation nor because its members are servants of the defendant companies. The defendant companies do not represent intervenor. Their interests are in conflict with those of Intervenor and its members . . . The elements of representation or identity of interest between Intervenor and defendant companies are wholly absent, and the Intervenor and its members may not be bound by the injunctive decree without being parties to the action."

A court has no power to hold in contempt for failure to comply with a court order, one who is not bound by the decree

because not a party to the action or not in privity to a party. Heyman v. Kline, supra; see generally 7 Moore's Federal Practice, Section 65.02[4].

Dr. Horowitz was not a party to the original action; nor, as the District Court recognized in granting the intervention motion, was he in privity to the original parties. They did not represent his interests in the proceedings resulting in issuance of the May 27th injunction. It was a fundamental denial of due process to force him to comply with an order which did not adjudicate his rights, and which he was attempting to vacate or modify in an orderly fashion. Accordingly, the contempt adjudication against him must be vacated.

CONCLUSION

FOR THE FOREGOING ADDITIONAL REASONS, THE ORDER APPEALED FROM SHOULD BE VACATED OR MODIFIED; AND THE CONTEMPT ADJUDICATION AGAINST DEFENDANT-APPELLANT HOROWITZ SHOULD BE REVERSED AND VACATED.

Respectfully submitted,

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Dated: New York, New York
September 17, 1976

9-17-76 recd by Amelia Hutter
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9-17-76 recvd by R. P. Card, A.U.S.A.